United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

w/ affidavit

75-4182

To be argued by
STUART I. PARKER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4182

JACQUES PIERRE,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

ROBERT B. FISKE, JR.,
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Special Assistant United States Attorney,
Of Counsel.

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M-1601

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- v -

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IMMIGRATION AND NATURALIZATION SERVICE,

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BRIEF FOR RESPONDENT

ISSUE PRESENTED

WHETHER THE DECISION OF THE BOARD OF IMMIGRATION APPEALS, AFFIRMING THE IMMIGRATION JUDGE'S DENIAL OF PIERRE'S APPLICATION FOR WITHHOLDING DEPORTATION, WAS ARBITRARY, CAPRICIOUS OR AN ABUSE OF DISCRETION

STATEMENT OF THE CASE

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a, Jacques Pierre petitions this Court for review of a final order of

deportation entered by the Board of Immigration Appeals of May 1, 1975. That order dismissed an appeal from the decision of an Immigration Judge denying Pierre's application for withholding of deportation pursuant to Section 243(h) of the Act, 8 U.S.C §1253(h). Petitioner contends that the Board's order should be vacated and the cause remanded for further proceedings before the Immigration Judge.

STATEMENT OF FACTS

The petitioner is a 46 year old alien, a native and citizen of Haiti, who was admitted to the United States on or about October 18, 1969 as a nonimmigrant in transit for a period of 3 days. He failed to depart at the expiration of his authorized stay and has continued to reside in this country in violation of the law.

On June 6, 1973 the Immigration and Naturalization Service (the "Service") commenced deportation proceedings against the petitioner with the issuance of an order to show cause and notice of hearing charging that he was deportable from the United States under Section 241(a)(2) of the Act, 8 U.S.C. §1251(a)(2), because of his having stayed in the United States for a longer time than permitted (T. 15).* After the commencement of deportation

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* References preceded by "T" are to the certified administrative record which had been filed with the Court.

proceedings, Pierre applied to the Service's District Director in New York for political asylum. The scheduled deportation hearing was adjourned in order to give the District Director an opportunity to consider his application for asylum. In accordance with established procedures, see 8 C.F.R. §108.2, the Service's District Director requested an advisory opinion from the Department of State, Office of Refugee and Migration Affairs (T. 12). On July 11, 1974 the Department of State responded and found that there was no reason to believe that the petitioner should be exempted from regular immigration procedures on the grounds that he would suffer persecution within the meaning of Section 243(h) of the Act (T. 11). On July 16, 1974 the Service denied the petitioner's request for political asylum (T. 10), and proceeded forward with the deportation proceedings.

At his deportation hearing on November 17, 1974 the petitioner, by his counsel, conceded his deportability as charged in the Order to Show Cause (T. 8, p. 1). During that hearing Pierre again applied for withholding of deportation pursuant to Section 243(h) of the Act (T. 8, p. 12, T.. 9). In response to the application for discertionary relief the Service's trial attorney offered

into evidence the Department of State's advisory opinion which had previously been obtained by the Service, as well as the District Director's request for that recommendation. During the hearing the petitioner was questioned by his attorney in an effort to elicit testimony which might have supported his alleged fear of political persecution (T. 8, pp. 14-16).

On November 25, 1974 the Immigration Judge rendered a decision denying Pierre's application for withholding of deportation (T. 7). The decision noted that Pierre had failed to sustain his burden of proof with regard to his claim of anticipated persecution. The Immigration Judge granted Pierre the discretionary privilege of voluntary departure in lieu of enforced deportation. On December 9, 1974 Pierre appealed the decision of the Immigration Judge to the Board of Immigration Appeals (T. 6). On May 1, 1975 the Board dismissed that appeal (T. 2). On August 27, 1975 the alien filed this action for judicial review of that order. Since the filing of this petition he has enjoyed the automatic statutory stay of deportation which accompanies the filing of a petition pursuant to Section 106 of the Act, 8 U.S.C. §1105a.

RELEVANT STATUTE

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, U.S.C. §1253 -

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

RELEVANT REGULATION

Title 8, Code of Federal Regulations (C.F.R.)

§242.17 Ancillary matters, applications.

* * *

(c) Temporary withholding of deportation **** The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed. * * *

ARGUMENT

POINT I

THE ATTORNEY GENERAL DID NOT ABUSE HIS DISCRETIONARY AUTHORITY IN DENYING PETITIONER'S APPLICATION FOR TEMPORARY WITHHOLDING OF DEPORTATION

A. General Background

Section 243(h) of the Act, 8 U.S.C. §1253(h), authorizes the Attorney General to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." Thus, the determination whether to withhold deportation rests wholly in the administrative judgment and opinion of the Attorney General or that of his duly authorized delegate.* Muskardin v. Immigration and Naturalization Service, 415 F.2d 865 (2d Cir. 1969).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. §242.17(c); Chen v. Foley, 385 F.2d 929 (6th Cir. 1967), cert. denied, 392 U.S. 838 (1968).** The statute requires a showing not

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* The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. 3.1.

** The petitioner incorrectly describes the burden of proof in these proceedings (Petitioner's Brief pp. 5-6). The Government must prove that Pierre is deportable by clear, convincing, and unequivocal evidence. This was established when Pierre conceded deportability (T. 8, p. 1) at the deportation hearing. On the other hand, the alien bears the burden of proof with regard to his application for withholding of deportation under Section 243(h) of the Act. 8 C.F.R. 242.17(c).

only that the alien concerned is likely to be persecuted in the country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that "[o]nly where there is clear probability of persecution to the particular alien is this discretion to be favorably exercised." Cheng Kai Fu v. Immigration and Naturalization Service, 386 F.2d 750, 753 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

In examining the broad exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. Muskardin v. Immigration and Naturalization Service, supra; Zupicich v. Esperdy, 319 F.2d 773 (2d Cir. 1963). Unless the Attorney General's delegate's determination is found to be without any rational explanation, to depart inexplicably from established practice or to rest on an impermissible basis, the Court should not substitute its judgment for his. Wong Wing Hang v. Immigration and Naturalization Service, 360 F.2d 715 (2d Cir. 1966); Vardjan v. Esperdy, 197 F. Supp. 931 (S.D.N.Y. 1961), aff'd., 303 F.2d 279 (2d Cir. 1962).

Accordingly, the issue before the Court is whether the Attorney General has abused his discretionary authority by denying the alien's application for withholding of deportation.

M-1601 B. The evidence before the Attorney General failed to establish a clear probability of political persecution.

From the facts of this case it is evident that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason. The reasons relied upon by him were neither arbitrary nor capricious. The decision did not inexplicably depart from established policies; nor did it rest on an impermissible basis such as an invidious discrimination against a particular race or group. The Immigration Judge followed the well-established rule; that withholding of deportation is warranted only where the alien establishes there is a clear probability of his persecution. Cheng Kai Fu v. Immigration and Naturalization Service, supra; MacCaud v. Immigration and Naturalization Service, 500 F.2d 355 (2d Cir. 1974).

The record in this case clearly shows that Pierre "failed to establish a well founded fear that his life or freedom would be threatened in Haiti on account of his race, religion, nationality, membership in a particular social group or political opinion (T. 7, p. 3)." All Pierre could say in suppport of his claim of anticipated political persecution was that he supported DeJoie, a politician who oppossed Duvalier in 1975, and that he was employed in Haiti by a man

who was allegedly murdered because of his support of DeJoie. Pierre could not point to any incident where he or his family, which continues to live in Haiti, were ever personally threatened or harassed because of race, religion or political opinion.

In short, the Immigration Judge did not abuse his discretion in refusing to withhold Pierre's deportation, particularly since Pierre failed to set forth any facts establishing that he would be subject to political or other persecution upon his return to Haiti. 8 C.F.R. 242. 17(c); Cheng Kai Fu v. Immigration and Naturalization Service, supra.

We next turn to Pierre's request that this action be remanded to the Immigration Judge for a hearing on the actual conditions of life in Haiti. It is respectfully submitted that this request is made solely to prolong Pierre's illegal sojurn in this country. Whether or not the National Geographic's account of the general conditions* existing in Haiti is accurate (see Petitioner's Brief p. 3-5), the

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* In any case, it should be noted that the quotes from the National Geographic article in Pierre's brief do not even deal with present political conditions in Haiti. They discuss life under "Papa Doc," who is dead.

petitioner had ample opportunity to establish his claim in the administrative proceedings. Furthermore, it is not the general conditions in Haiti that are relevant in these proceeding. As noted in Point I, A supra, the petitioner must establish that there exists a clear probability that he will suffer persecution if deported to Haiti. The general conditions in Haiti, as well as, unsubstantiated allegations regarding someone Pierre claims he worked for, will not satisfy this requirement.

C. The advisory opinion from the Department of State was properly admitted into evidence during the deportation proceedings.

This petitioner first made an application for political asylum with the District Director for the Service (T. 13). Under established procedures, 8 C.F.R. §108, if the District Director does not immediately approve the claim, he forwards it to the Office of Refugee and Migration Affairs, Department of State, for an expression of its views. The letter from the Department of State is merely advisory in nature and is not binding upon the service. After studying the case, the Director of the Office of Refugee and Migration Affairs was of the opinion that petitioner did not have a valid persecution claim and the District Director concurring, denied the application. The refusal of the District Director

to grant an application for asylum did not deprive the alien of again applying for withholding of deportation pursuant to Section 243(h) of the Act at a deportation hearing.

Subsequently, petitioner applied for withholding of deportation and his persecution claim was considered de novo by the Immigration Judge. At the hearing before the Immigration Judge, the letter from the State Department was merely one piece of evidence considered by the Immigration Judge and was no in way binding upon him.

It is submitted that this letter recommendation came from a knowledgeable and competent source and was therefore admissible at the hearing. Asghari v. Immigration and Naturalization Service, 396 F.2d 391 (9th Cir. 1969). Such letters have been held admissible, even though their quality may be questioned. Hosseinmardi v. Immigration and Naturalization Service, 405 F.2d 25 (9th Cir. 1969). In this case the advisory opinion, which was entered into evidence without objection, was certainly probative in nature, and could be considered by the Immigration Judge in rendering his decision.

The Immigration Judge made his decision based on the totality of the evidence, including the petitioner's testimony. He enjoyed the advantage of seeing and hearing the petitioner, and was in the best position to determine

the accuracy, reliability and truthfulness of the petitioner's testimony; and his evaluation thereof is entitled to great weight. Kokkinis v. District Director, 429 F.2d 938 (2d Cir. 1970).

The deportation hearing complied with all the requirements of a fair hearing. The petitioner was represented by counsel. He was given the opportunity to be heard and to introduce evidence and witnesses on his behalf. 8 C.F.R. §242.16. Absent any arbitrariness or abuse of discretion, the decision of the Immigration Judge should be allowed to stand.

CONCLUSION

THE PETITION FOR REVIEW SHOULD BE DISMISSED.

Dated: New York, New York
March 3, 1976

Respectfully submitted,

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- Of Counsel -

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 75-4182

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that s he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 3rd day of March, 19 76 s he served 2 copy s of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Claude Henry Kleefield, Esq.,
100 West 72nd St.
Suite 400
NY NY 10023

And deponent further says s he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

3rd day of March, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977